BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANTONIO GUERRA	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,059,528
FOUNTAIN GLASS, INC.	)	
Respondent	)	
AND	)	
	)	
REGENT INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant appealed the October 31, 2012, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. C. Albert Herdoiza of Kansas City, Kansas, appeared for claimant. Anton C. Andersen of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the October 31, 2012, preliminary hearing and exhibits thereto; and all pleadings contained in the administrative file.

ISSUE

Did claimant sustain left upper extremity injuries by accident or by repetitive trauma arising out of and in the course of his employment with respondent?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Since 2008, claimant was employed by respondent as a residential and commercial window installer. On January 12, 2012, claimant was working in respondent's shop. He and another of respondent's employees moved a large piece of glass to another rack to

make room in the shop. Claimant estimated the piece of glass weighed 350 pounds. Claimant placed his left hand underneath the glass to lift it and used his right hand to stabilize the glass. As he was lifting the glass, claimant felt his left hand begin to hurt. After he put the glass down, claimant's left wrist hurt. Claimant is right-hand dominant.

Claimant testified that prior to January 12, 2012, he had never received treatment for his left hand, wrist or arm. Nor had he had any pains or symptoms of any kind regarding health issues with his left hand, wrist or arm. Claimant testified that after the January 12, 2012, incident he was off work for six weeks and then returned to his regular job duties for respondent.

Claimant immediately told his boss of the left hand injury and of needing to see a doctor. Claimant's boss authorized treatment with Dr. David P. Ramirez, who saw claimant on January 16, 2012. He ordered x-rays of the left wrist and hand, which were interpreted by Dr. Thomas B. Summers on January 16, 2012. Dr. Summers' findings concerning the left wrist were: (1) a transverse fracture through the proximal third of the navicular bone; (2) no other fracture or dislocation; (3) degenerative changes of the intercarpal joint between the navicular and trapezium bones; (4) the radiocarpal joint appeared normal and (5) the soft tissues were unremarkable.

Dr. Summers' findings on the left hand were: (1) a healed fracture of the second metacarpal shaft; (2) no acute fracture or dislocation; (3) no other bone lesion; and (4) the articular surfaces appeared normal and the soft tissues were unremarkable.

Claimant was referred by Dr. Ramirez to orthopedic hand specialist Dr. Lanny W. Harris. He saw claimant on January 19, 2012, and ordered an MRI of claimant's left wrist. Dr. Harris' notes from that visit indicated claimant had a two-week history of pain in his left wrist and that claimant did a lot of hammering with his hands and wrists. Claimant also gave a history of increased problems with the right wrist and a lot of discomfort for a long time. Dr. Harris' notes indicated claimant gave no particular history of injury for the left or right wrist. No mention was made of the incident wherein claimant lifted the 350-pound piece of glass.

On January 20, 2012, claimant underwent an MRI, which was interpreted by Dr. Michael B. Parsa. After reviewing the MRI, Dr. Harris wrote a letter to respondent dated January 24, 2012. In that letter he stated, "Antonio Guerra had a recent MRI of his left wrist. This shows evidence of an old fracture of his scaphoid with a residual deformity."[1] Dr. Harris also stated, "Perhaps the pain has been aggravated by the recent injury but certainly not the basic underlying cause for his pain."[2] When Dr. Harris saw

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[1] P.H. Trans., Resp Ex. B.

[2] *Id.*

claimant on February 7, 2012, he noted that, "X-rays were repeated of the left wrist today, showing a proximal pole ununited. It is an old fracture. He has early degenerative changes or moderately advanced degenerative changes of the left wrist."[3]

On February 7, 2012, claimant filed an application for hearing alleging that he injured his left upper extremity on January 12, 2012, while lifting a 350-pound mirror. The application for hearing was never amended.

A preliminary hearing was set for June 27, 2012, but the parties instead entered into an agreed order appointing Dr. Vito J. Carabetta to perform an independent medical evaluation. According to the agreed order, Dr. Carabetta was to provide the court and the parties with written opinions on the following:

> 1. Diagnosis of injury, if any, to the claimant's left upper extremity.
> 2. Whether the claimant's repetitive job duties were the prevailing factor in causing such injury.[4]
> 3. Treatment recommendations, if any, for such injury.
> 4. If no treatment is recommended, a functional impairment rating for the injury based on the *AMA Guides to the Evaluation of Permanent Impairment, 4th Edition*.[5]

Dr. Carabetta reviewed the medical records of Drs. Ramirez, Harris, Summers and Parsa. He also physically examined claimant. Claimant related to Dr. Carabetta of injuring the left wrist while moving a 300-pound window assembly. Dr. Carabetta's impression was that claimant had a chronic left scaphoid fracture. As to causation of claimant's left wrist injury, Dr. Carabetta stated:

> The question has been asked whether the claimant's repetitive job duties were the prevailing factor in causing such injury. The answer to this is quite straightforward, as clearly it is not. He points to a specific incident that occurred abruptly on January 12, 2012. Prior to that, he was not aware of any symptomatology. The x-ray changes are such that they would require the fracture to have occurred quite a number of years ago to bring about the current appearance.[6]

Claimant introduced a document dated March 23, 2012, signed by Dr. John Sayegh. Dr. Sayegh checked a box that indicated:

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[3] *Id.*

[4] It is unknown why the ALJ and the parties asked Dr. Carabetta to give an opinion on whether claimant's repetitive job duties were the prevailing factor causing claimant's left upper extremity injuries, as claimant in his application for hearing and at the preliminary hearing alleged his left upper extremity injuries were sustained in a single accident on January 12, 2012.

[5] ALJ Agreed Order (July 10, 2012) at 1.

[6] P.H. Trans., Resp. Ex. A at 3.

> **Yes**, it is my opinion within reasonable medical certainty, that the accident of 01/12/12 is the prevailing factor in causing the injury, Mr. Guerra's present medical condition and resulting disability to Mr. Guerra's left upper extremity, and that he requires additional reasonable and necessary medical treatment as follows:[7]

However, Dr. Sayegh made no recommendations concerning medical treatment. No other medical records of Dr. Sayegh concerning claimant were placed into evidence. Claimant never testified he saw Dr. Sayegh.

ALJ Hursh denied claimant's request for payment of outstanding medical expenses,[8] additional medical treatment and temporary total disability benefits. He found claimant's only identifiable and treatable injury occurred before claimant's January 12, 2012, work accident. ALJ Hursh concluded that when claimant lifted the glass, he conceivably could have aggravated or made symptomatic his preexisting scaphoid fracture. However, under K.S.A. 2011 Supp. 44-508(f)(2), if a preexisting condition is solely aggravated or made symptomatic by a subsequent work injury, the subsequent work injury is deemed not arising out of and in the course of employment.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.[9] "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."[10]

This Board Member finds that claimant has failed to prove by preponderance of the evidence that he sustained left upper extremity injuries by accident on January 12, 2012, or by repetitive trauma arising out of and in the course of his employment with respondent. In his application for hearing, claimant alleged a single traumatic accident as the cause of his left upper extremity injury. There is some indication in the record that claimant alleged his left upper extremity injury was instead, or additionally, caused by repetitive trauma. This confusion appears to be created by the July 10, 2012, Agreed Order of the parties

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[7] *Id.*, Cl. Ex. 2.

[8] Respondent and its insurance carrier were ordered to pay as authorized medical expense an outstanding bill of $2,248.80 to Olathe Medical Center. This was for a date of service of January 20, 2012, which is the same date as the MRI requested by Dr. Harris, who was an authorized medical provider at the time.

[9] K.S.A. 2011 Supp. 44-501b(c).

[10] K.S.A. 2011 Supp. 44-508(h).

directing Dr. Carabetta to render an opinion as to whether the claimant's repetitive job duties were the prevailing factor in causing his left upper extremity injury. In his application for hearing and at the preliminary hearing, claimant alleged his left upper extremity injuries were the result of a single traumatic accident on January 12, 2012. Claimant also told Dr. Carabetta of injuring the left upper extremity while lifting a large piece of glass. Only Dr. Harris' notes of January 19, 2012, indicate claimant gave no particular history of injury.

Drs. Harris and Carabetta opined claimant's left upper extremity injury preexisted the January 12, 2012, incident. Dr. Carabetta went so far as to state claimant's left wrist fracture occurred a number of years earlier. Dr. Sayegh's checking yes to a statement prepared by claimant's attorney on prevailing factor is not persuasive.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[11] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[12]

WHEREFORE, the undersigned Board Member affirms the October 31, 2012, preliminary hearing Order entered by ALJ Hursh.

IT IS SO ORDERED.

Dated this ____ day of January, 2013.

THOMAS D. ARNHOLD
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge

[11] K.S.A. 2011 Supp. 44-534a.

[12] K.S.A. 2011 Supp. 44-555c(k).